United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

76-1030

B
P/S

To be argued by
HARRY E. YOUTT

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

SIMON BRACH,

Defendant-Appellant

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR APPELLANT

HARRY E. YOUTT
STEVEN H. THAL
THAL & YOUTT
Attorneys for Defendant-Appellant
919 Third Avenue
New York, New York 10022
(212) 751-3300

(9219)
LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850
New York, N.Y. (212) 563-2121
Philadelphia, Pa. (215) 563-5587
Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

Again, the defendant's objection

TABLE OF AUTHORITIES

CASES:

Page

Page

Page

STATUTES AND RULES:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-1030

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

SIMON BRACH,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Court below erred in denying defendants' motion for judgment of acquittal upon the ground that, as a matter of law, the alleged theft occurred after the goods had lost their character as a foreign shipment since:

a) they were delivered to the consignee at the time the consignee's own driver and truck picked them up at the pier and/or

b) under all the facts and circumstances, they were subject to the complete custody, dominion and control of the consignee at the time the consignee's truck was parked near its premises and part of the goods were unloaded

into the premises.

2. Whether the Court below erred in denying defendant's request to charge on the factual issue of foreign commerce, which charge would have permitted the jury to evaluate all facts bearing upon the question of delivery to the consignee and the consignee's exercise of custody, dominion and control over the goods at the time of the alleged theft.

3. Whether the Court below erroneously withdrew the factual issue of foreign commerce from the jury by instructing the jury that "delivery" of the goods sufficient to remove them from foreign commerce could not occur until they were unloaded from the consignee's truck unto his premises.

4. Whether the Court below deprived defendant of his Sixth Amendment right to effective assistance of counsel by precluding counsel from developing the factual issues of delivery, custody and control as they bore upon the issue of foreign commerce in closing argument.

5. Whether the Court below erred in denying defendant's motion to suppress oral and written statements, upon the ground that they were involuntarily given by defendant, who thought he had been promised immunity from prosecution.

6. Whether the Court below should have instructed the jury that they could disregard evidence of defendant's statements if they found that they were involuntarily made.

7. Whether the Court below erroneously refused to exclude prejudicial and irrelevant testimony to the effect that:

a) the customs agent assigned to investigate the defendant's case searched for him regularly at racetracks and betting parlors, and

b) arrest warrants were issued for the individuals to whom the defendant sold the allegedly stolen goods, when, in fact, no evidence of their subsequent prosecution was offered.

8. Whether the Court below erroneously refused to adjourn defendant's trial until after it decided an application under 28 U.S.C. §2255 to set aside an earlier conviction of defendant which had been pending before the same Court for several months, since evidence of that earlier conviction was introduced to impeach defendant's credibility.

9. Whether defendant's Sixth Amendment right to summon witnesses in his behalf was denied when the Court refused to permit his wife to testify, which testimony would have been relevant to defendant's claim that he had a right to possession of the goods in question.

10. Whether evidence of defendant's prior convic-

tions was erroneously admitted to impeach his credibility, since its prejudicial impact substantially outweighed its relevance and necessity.

11. Whether the Court below erroneously denied defendant's motion for judgment of acquittal upon the ground that the Government failed to establish a prima facie case that the goods in question were stolen.

NATURE OF THE CASE

This is an appeal from the judgment of conviction entered against defendant on December 19, 1975 on an indictment which charged him with the theft of 166 cartons of car stereo units from a foreign shipment of freight, in violation of 18 U.S.C. §659. Defendant was found guilty after a jury trial on October 28, 1975.

At his trial, defendant moved, pursuant to F.R. Crim. P. Rule 29(a) for judgment of acquittal upon the principal ground that the evidence was insufficient as a matter of law to establish that the shipment in question was:

> "...moving as and constituted a foreign shipment of freight"

since the Government's evidence had shown that the goods allegedly stolen had already been delivered to

the ultimate consignee. The court denied this motion.

The court also denied defendant's principal request to charge on the factual issue of whether the goods in question were in foreign commerce at the time of the theft or whether they had lost their character as foreign commerce by becoming subject to the complete dominion and control of the consignee. Similarly, the court refused to allow counsel to argue in summation the factual issue of delivery, custody and control as it bore upon the ultimate issue of foreign commerce. Defendant appeals from all such dispositions.

Prior to the trial the court conducted a hearing on the voluntariness of oral and written statements made by defendant to customs agents. The court found the statements to have been voluntarily made, and they were introduced in evidence against him.

Defendant also appeals from numerous other dispositions of the court relevant to his trial, including refusal of the court to adjourn the trial until after disposition of a pending application under 28 U.S.C. § 2255 to set aside his conviction of an earlier offense, the admission of prejudicial evidence at the trial, the refusal of the court to permit defendant to summon his wife as a witness, the admission of prior conviction testimony to impeach his credibility, and the refusal of the court to

enter a verdict of acquittal for failure of the Government to present a prima facie case that the goods had, in fact, been stolen.

Defendants Notice of Appeal was timely filed on December 29, 1975, and forwarded to this Court on December 31, 1975.

FACTS

The defendant, Simon Brach has been convicted of stealing a shipment of car stereo units from a truck owned and operated by his family's business. Defendant is the son of the owners of the Fried Trading Company, which was the ultimate consignee of the allegedly stolen goods.

The Fried Trading Company is located at 167 Clymer Street in Brooklyn, New York. It is engaged in the business of the wholesale marketing of electronic equipment. Defendant's mother, stepfather and brothers operate the business (App.197a). For a substantial period of time, defendant also worked for the Fried Trading Company. However, in late 1974, as the result of family differences, defendant left the employ of the Fried Trading Company (App. 197a,202a,203a).

On March 5, 1975, the Fried Trading Company was to pick up a shipment of car stereo units which had recently

arrived at a Brooklyn pier from Japan. In accordance with its general procedures, it dispatched one of its employees, Mr. Israel Follman to go to a Brooklyn pier in one of the trucks owned by the Fried Trading Company and pick up the shipment (App. 23a). Prior to leaving for the pier, Mr. Follman was given shipping documents which had been cleared through a Customs broker (App. 24a,39a-40a).

Mr. Follman went to the pier, presented his documents, hired a person to assist in loading the shipment onto the Fried truck supervised the loading, and cleared the shipment through the Customs process (App. 39a-44a)

Thereafter, he left the pier, stopped for a cup of coffee, made a telephone call, and returned to the Fried Trading Company (App. 45a-46a). He parked the truck outside of the Fried Trading Company about 50 feet from its entrance, removed two cartons from the shipment, and took them inside (App. 47a-49a). While he was inside, he requested instructions as to what to do with the truck and was told to drive it up to the Company's unloading dock (App. 33a,48a-50a).

When he returned to get the truck, he found it to be missing. The truck had been parked for ten to fifteen minutes (App. 33a-34a,48a).

The defendant stated that, in fact, he drove the truck away after he saw Mr. Follman go inside the Fried Trading Company (App.100a-101a,197a-198a). He testified that he did so because, as the result of a dispute with his family and

their refusal to provide him with a share of the profits from the business, he felt he was entitled to take the shipment (App. 197a).

Defendant sold the shipment later that day to an individual from New Jersey (App. 102a-107a, 198a).

When defendant was arrested several weeks later, he promptly told the arresting Customs agents that he had sold the goods and offered to assist in locating the person to whom he had sold them. He later did, in fact, provide such assistance, and several of the stereo units were ultimately recovered (App. 100a-109a).

In connection with his assistance to the Customs agents, defendant signed two Waivers of Speedy Arraignment and made an oral statement to the agents concerning the circumstances of the alleged theft (App. 111a-113a; 124a-125a). These oral and written statements were used in evidence against defendant, after motions to suppress them upon the grounds that they were involuntary products of promises of immunity were denied by the trial court (Transcript of Suppression Hearing, p. 103-104).

The trial took place on October 27 and 28, 1975. At the trial, defendant moved for judgment of acquittal upon the ground that the allegedly stolen goods had been delivered and thereby lost their character as a foreign shipment subject to the protection of 18 USC § 659 as of the time they were picked up by the Fried Trading Company's driver at the

pier or alternatively at the time the truck was parked and partially unloaded at the Fried Trading Company premises (App.138a-156a). This motion was denied by the court (App.156a)

Contemporaneously with that ruling, the court also refused to include one of defendant's requests to charge on the issue of foreign commerce in its instructions to the jury (App.165a). The request to charge outlined the factual details which defendant contended had a bearing upon the issue of fact:whether delivery had taken place sufficient to remove the goods from foreign commerce (App.164a-165a).The court ruled instead that the issue of delivery was strictly one of law and that the jury would only be free to consider as an issue of fact whether it believed the witnesses who testified concerning the parking of the truck in front of the Fried premises (App.166a-170a). At the same time, the court ruled that defense counsel would not be permitted to argue to the jury a[illegible] factors bearing upon the issue of custody, dominion or control in support of the argument that delivery had, in fact, occurred and the foreign commerce nature of the shipment had ended (App.171a-187a).

The court's actual charge on the factual issue of foreign commerce was similarly circumscribed. In its first discussion of the matter, the court set forth that the foreign commerce aspect of the shipment:

> "continues until the merchandise arrives at its destination, that is, Fried's place of business, and is there delivered to the consignee by actual unloading or by presenting to the consignee complete possession over which he has complete domain at the time.

theft and reversed t

> Until that occurs, the shipment is still a foreign shipment. It is not enough just to stop in front of the Fried place of business. " (App. 233a-234a).

After the jury returned with a question addressed to the issue of Federal jurisdiction (App.256a), the court further set forth the instruction that the shipment does not lose its foreign commerce characteristic.

> "...until the person has complete control of it. If it is unloaded, then it is no longer a foreign shipment.
>
> But the fact that it arrived at its destination at that moment does not mean it lost its characteristic as a foreign shipment.
>
> The fact that the truck stopped does not mean it lost its characteristic."(App.260a).

Defendant objected to both of the above charges (App.260a). Shortly after the second charge was given, the jury returned the verdict of guilty and the defendant assesses as error the giving of the charges.

During the trial, the court permitted the arresting Customs agent to testify that, prior to defendant's arrest, he searched for the defendant at such locations as the Aqueduct Racetrack and "OTB Parlors" (App.89a). Defendant's objection on the basis of relevance and the "danger of prejudice" was denied (App.89a). The same agent also testified that after defendant provided him with the name of the purchasers of the goods, arrest warrants were issued for those purchasers (App. 108a).

Again, the defendant's objection as to relevancy and prejudice was denied (App.108a-109a). Defendant contends here that the admission of those items of evidence constituted prejudicial error.

Also during the trial, the court refused to permit defendant's wife to take the stand to provide testimony consistent with defendant's contention that he had a right to possession of the goods in question and the truck in which they were contained (App.191a-192a). Defendant contends that such a denial violated his constitutional right to summon witnesses in his behalf.

Defendant also objected to questions on his cross-examination concerning his prior convictions and their use as impeachment testimony. These objections were overruled and his answers revealed two prior convictions (App. 200a-201a).

At the close of the Government's evidence, defendant also moved for judgment of acquittal upon the ground that the Government had failed to establish a prima facie case that the goods in question had, in fact, been stolen (App. 161a-162a). No person from the Fried Trading Company testified as part of the Government's case in chief that the goods had been stolen by defendant. The only evidence of theft was contained in defendant's written and oral statements which conceded that he "stole" the goods.

In his defense, the defendant summoned two of his brothers, principals at the Fried Trading Company, neither of whom would deny that defendant, by virtue of his being a member of the family, had a right to take the goods in question (App. 211a, 219a). And defendant himself testified that he considered that he had the right to take the goods because he was a part of the family business and money was owed to him (App.197a-198a).

Finally, prior to trial, defense counsel, by letter to the court dated October 9, 1975, requested an adjournment of the trial pending a disposition of defendant's application to the same court under 28 U.S.C. §2255 to set aside an earlier conviction (App.5a-6a). Counsel contended that in the event of a favorable decision on the application, evidence of the prior conviction could not be used against defendant as a similar act or to impeach his credibility. The court refused to grant the adjournment, and in fact, has not yet decided the application to set aside the prior conviction, in spite of the fact that that application has been pending since July 3, 1975. In fact, the prior conviction was relied upon by the Government for purposes of impeaching defendant's credibility (App.199a-201a). Its danger of prejudice was substantial, in light of the fact that the prior conviction for possession and sale of goods stolen from a foreign shipment was similar to the offense for which defendant was on trial. Because of the sensitivity of this prior conviction, defendant contends that the court's denial of his application for an adjournment prior to the determination of the application constituted a reversible error.

ARGUMENT

I. DEFENDANT WAS ENTITLED TO A JUDGMENT OF ACQUITTAL BECAUSE THE GOVERNMENT FAILED TO ESTABLISH THAT THE ALLEGEDLY STOLEN GOODS WERE IN FOREIGN COMMERCE AT THE TIME OF THE ALLEGED THEFT.

Defendant contends that the shipment had come to rest and become a matter of local commerce either at the time it was picked up by the consignee at the Brooklyn pier or at the time the consignee's truck containing the shipment was parked at the consignee's warehouse and partially unloaded.

In seeking an interpretation of the operative criminal statute, 18 U.S.C. §659, defendant submits that as a criminal statute, it must be "strictly construed" and that disputed words must be given their "narrow meaning". Yates v. United States, 354 U.S. 298 (1956) at 310. The leading recent case in this Circuit concerning the issue of when the interstate or foreign character of a shipment begins and ends is United States v. Astolas, 487 F.2d 275 (2d Cir. 1973) cert denied 416 U.S. 938 (1974). The Court held that determination of this issue requires a practical, common sense, ad hoc determination based on all relevant factors,

including, among others, the relationship of consignor, consignee and carrier, if separate entities, the physical location of the shipment when stolen and whether ultimate delivery to the consignee has been made. Applying this test to the facts of the case presently of record, defendant submits that the Government failed as a matter of law to satisfy its burden of establishing the foreign commerce nature of the goods at issue at the time of the alleged theft, as is more fully discussed below.

A. <u>The shipment lost its foreign commerce character when picked up by the consignee at the Brooklyn pier</u>.

Based upon the facts established in the Government's case, defendant contends that delivery of the goods in question was sufficient to remove them from the stream of foreign commerce over which federal jurisdiction exists, at the time they were picked up by the consignee at the Brooklyn pier. On the day of the theft, the driver, Mr. Follman, an employee of the Fried Trading Co., (App.17a) drove to Pier 12 in Brooklyn to pick up a shipment of car stereos that had recently arrived from Japan (App.23a,38a-39a). In fact, it was the general practice of the Fried Trading

Company to pick up shipments from foreign commerce in their own truck at the pier (App.37a-38a).

There was abundant and overwhelming evidence to establish that Fried Trading Company exercised complete dominion and control over the shipment at the Brooklyn Pier. The driver obtained possession of the goods by presenting a pick-up order for them (App.40a). He then employed and directed an extra laborer (who was paid by the Fried Trading Company)(App.40a) to load the goods.

The driver then cleared the shipment through customs(App. 41a-42a) and embarked on his way back to the Fried Trading Company.

At all relevant times in connection with the pick up of the shipment, the driver was subject to the control of his employer. (See App.46a-47a):

> Q ... And as far as your job is concerned you do what Mr. Fried or the bosses, so to speak, tell you to do or require you to do at the Fried Trading Company, is that correct?
>
> A. Right. (App.47a)
>
> * * *
>
> Q All of them at Fried Trading Company, they're the only people that give you orders?

A. Right.

Q As to where to take the truck, is that right?

A Yes. (App.52a-53a)

An evaluation of the shipping documents and procedure incident to the shipment at issue here further supports a finding that dominion and control over the shipment was effected at the pier and was not encumbered by continued control by Customs. No delivery instructions appeared on the face of the original documents, including the bills of lading (Government Exhibits 5 and 6, App. 261a-262a). Indeed, all such documents were routed through a customs broker who had released the documents to the Fried Trading Company prior to their pick-up. (App.40a).

The Special Customs Invoices issued by Customs in connection with the delivery, listed Fried Trading Company as the purchaser but listed a Bedford Avenue address which the Fried Trading Company no longer occupied. (Government Exhibits 7 and 8, App. 263a, 269a).

At the time of the pick-up, the driver presented the cleared documents (App.41a-42a). Customs stamped the shipment "released" (App.42a) and permitted the driver to sign the goods out (App.43a).

So far as the record appears, the shipment wa not subject to any further direc tion, condition, or encumbrance by Customs after it was signed out from the pier.

The general legal rule in cases such as this is that pick-up by the consignee constitutes delivery as a matter of law. Thus in United States v. Jones, 446 F.2d 49 (4th Cir. 1971) the Court held that a suitcase at an airport was still in interstate commerce prior to being claimed by its owner:

> "While the baggage had arrived in the state of destination it had not been delivered to its owner, so that the interstate shipment was not yet complete."

Similarly in United States v. Gimelstob, 475 F.2d 157 (3rd Cir. 1973), where foreign commerce goods had arrived in port, were taken to the shipper's warehouse, and there held under the original bills of lading, the Court ruled that:

> "Here, where the tin had not yet been picked up and was still being held by the shipper under its original bills of lading, delivery had not yet occurred."

See also United States v. Yoppolo, 435 F.2d 625 (6th Cir. 1970) (goods still in commerce because not delivered to consignee).

Although it has been held that the shipper (or the consignee) and carrier may be one and the same, there still must be a demarcation between the local and the foreign or interstate commerce aspect of the transportation. Thus in United States v. Gollin, 166 F.2d 123 (3rd Cir. 1948) cert. denied 333 U.S. 875 (1948) the Court distinguished the facts of its case-where the outbound shipment was sealed, the truck parked, and the keys and papers set aside for the interstate driver before the theft-from the situation in which goods were stolen while being transported from the shipper to the interstate carrier. United States v. Fox, 126 F.2d 237 (2d Cir. 1942). Defendant contends in this case that the facts are clearly more akin to those in Fox, albeit at the other end of the shipment, since none of the transportation by the consignee involved actual interstate or foreign movement but was merely transportation from the carrier to its premises.

The only cases in which theft from a consignee carrier after pick-up has been held to be within federal jurisdiction as part of foreign or interstate commerce are characterized by the existence of significant additional factors. See United States v. Concepcion, 419 F.2d 263 (2d Cir. 1970) (goods being carried by consignee's customs

bonded agent to agent's bonded customs warehouse and thus still in Customs' "custody or control":

> "It is clear from the relevant customs statutes regarding bonded carriers and bonded warehouses that, as a matter of law, the shipment remained under custody of customs officers until it was cleared for release from the bonded customs warehouse and, at the very least, up to the point of such release, the goods are in foreign commerce."

Unlike the facts in Concepcion, the shipment was no longer in the custody or control of the Customs Bureau. It was not in a bonded truck or en route to a bonded warehouse, but had instead been completely released to the consignee.

In United States v. Thomas, 396 F.2d. 310 (2d.Cir. 1968), although the goods in question had been picked up at the pier and transported to the consignee's agents' warehouse, some 43 out of the 56 cartons were to be shipped immediately to customers out of state. Thus they constituted either a foreign or an interstate shipment and the Court upheld convictions under 18 USC §659. And in United States v. Schwartz, 150 F.2d. 627(2d.Cir.cert.den.326 US 757(1945), the court held that a consignee who picked up a foreign shipment in New Jersey and was transporting it to its warehouse in New York at the time of the theft was in interstate commerce and therefore covered by federal law.

None of these additional factors is present in this case to extend the foreign commerce nature of the shipment or to add an interstate commerce nature to it after the pick-up at the pier. Accordingly, as a matter of law, the shipment at issue lost its federally protected foreign commerce nature when

picked up at the pier by the consignee, much the way baggage would lose its interstate commerce nature when claimed by an airline passenger.

B. The shipment lost its foreign commerce nature when it arrived at the premises of the Fried Trading Company

Defendant submits that even if delivery as a matter of law did not take place at the time the goods were picked up, then delivery had at least occurred and custody, control, and dominion by the consignee had been effected by the time the truck had been driven back to the Fried Trading Company warehouse, parked, and partially unloaded. The power to determine the route from the pier to the Fried Trading Company was manifestly within the power of the Fried employee, as directed by his employers. In fact, the employee stopped, made a phone call, and had a cup of coffee on his way back (App.45a-46a).

Furthermore, even the power to choose the ultimate destination was within the employee's power. The basic shipping documents specified no address whatsoever. And the only customs documents which in fact bore an address referred to a former address of the Fried Trading Company (45 Bedford Ave.)(See Ex.8) no longer occupied by it (App. 44a).

Therefore, dominion and control, if it did not exist as a matter of law upon surrender of the goods to the Fried employee at the pier, was effected when the employee of Fried, in a Fried truck, chose the route home from the pier and even selected the destination, unencumbered by any directives or

requirements within the stream of foreign commerce. As summarized in an exchange of testimony on cross-examination with driver Follman:

> Q When you leave [the pier], do they ask you where you are going to go with the goods?
>
> A No.
>
> Q Do you have to tell them what you are going to do?
>
> A No. (App. 44a)

If not before, the shipment lost its character as foreign commerce as a matter of law, at the time when the Fried employee parked the Fried truck near the Fried business establishment and partially unloaded the contents of the shipment by taking two of the shipped cartons inside (Direct App.31a; cross App.48a). The goods at that time were in the possession of the Fried Trading Company. They were not with a carrier. As a matter of civil law they were "accepted". In fact, even if the goods were at that time revealed to be defective, in the ordinary course they would not be shipped back to the sender for "...a couple of weeks." (Direct examination of driver Follman, [App. 33a]).

This is simply not a situation in which goods were stolen before a shipment could reach its destination (i.e., the consignee or new owner) and become subject to the new owner's direction and control. The shipment had reached its destination, but the driver had elected not to back into the loading dock and unload yet (App.29a). So far as the record

they were taken [illegible] delivered at the time

reveals, there was no obstacle which prevented or obstructed the truck from being driven directly to the Fried loading dock and unloaded. Instead, the truck was parked by the employee, acting within the scope of his employment. This practice of parking on the street for short periods was one frequently used by the Driver (App.47a).

As the driver explained it:

> "I was waiting for instructions. He might tell me take the truck, deliver someplace else. He might. I never know what he's going to do with it.
>
> Q Okay. But you do what he says, is that correct?
>
> A Yes.
>
> Q Referring to "he," you are referring to whom, Mr. Fried?
>
> A All of them.
>
> Q All of them at Fried Trading Company? They're the only people that give you orders?
>
> A Right.
>
> Q As to where to take the truck, is that right?
>
> A Yes." (Cross Examination, [App.52a-53a])

The instructions which he did in fact receive when he went inside were "...to go out, back the truck into the dock."

> Q In order to unload the merchandise, is that correct?
>
> A Presumably, right." (Direct Examination [App.[illegible]];Cross Examination [App.49a])

However, when he returned to the parking space ten minutes later, the truck was gone (App.48a).

...that in actuality the Fried Trading Corp...

Bearing upon this issue the cases hold that:

> "An interstate or foreign shipment does not lose its characteristic until it arrives at its final destination and is there delivered."
> United States v. Yoppolo, supra.

As the court in United States v. Astolas, supra, has held, in effect by approving the trial court's charge, delivery occurs,

> "...either by actual unloading or by being placed to be unloaded." 487 F.2d. at 278.

Defendant contends that the shipment was "delivered" before the theft.

The question of what constitutes the point of delivery has been considered as a matter of law by numerous courts. In United States v. Astolas, supra, the inbound shipment had arrived in a truck, which was still sealed and parked outside the consignee's warehouse. They had neither been "examined nor accepted," and the court held that they were still a part of interstate commerce.

By contrast, in this case the goods had been examined, accepted and partially unloaded. As such, this case is more akin to O'Kelly v. United States, 116 F. 2d 966(8th Cir. 1941) in which a railroad car on the carrier's spur track had been unsealed, some of its contents of sugar removed by the consignee, and locked with the consignee's padlock before the theft. Because of these factors, the court held that the shipment had lost its interstate character at the time of the

The fact that the truck stopped does not mean it

theft and reversed the conviction under the predecessor to the statute at issue here.

Other cases have turned on the issue (among others) whether the carrier's vehicle was still sealed by the carrier at the time of the theft. See United States v. Cousins, 427 F. 2d. 382 (9th Cir. 1970) (railroad car on railroad's spur patrolled by railroad police and still under seal held still in interstate commerce); Chapman v. United States, 151 F.2d. 740 (8th Cir. 1945) (railroad car at railroad terminal, carrier's seal broken but resealed by carrier after partial unloading held still in interstate commerce.)

In light of the above decisions, it should be held as a matter of law that even if delivery did not occur at the time of pick-up from the pier, it certainly had occurred before the theft. The goods were in a Fried truck. They were unsealed. They had been examined and accepted. And some of them had been removed from the truck and carried inside. Under the authorities, they were therefore delivered "...by being placed to be unloaded" (United States v. Astolas, supra) and accordingly lost their character as a foreign shipment as a matter of law.

C. A proper application of applicable principles of Federalism requires that this Court reverse the trial court's denial of defendant's Motion for Judgment of Acquittal.

What is required for a proper disposition of this issue is not simply the academic construction of language in a criminal statute nor an application of the due process principle of strict statutory construction in favor of the accused. What is involved in one of its many facets is the task of drawing the line between that which is within the federal domain and subject to federal regulation and that which is within the domain of state or local regulation only. In this case, the alleged federal nexus is foreign commerce. The question before this Court is: When does that foreign commerce come to an end and become, in effect, local commerce subject only to protection by state criminal laws? In deciding that issue, this Court should be guided not only by the decisions interpreting 18 U.S.C. §659 discussed above, but also by the overriding policies involved in the adjudication of cases affecting the maintenance of federal-state relations in our federal system.

This Court's very recent decision in United States v. Bell, 524 F.2d. 202 (2d.Cir.1975) sheds light upon the federal-state issues involved here. In Bell, the Court reversed a conviction for possession of a firearm by a convicted felon since it was not proven that possession had occurred while moving in interstate commerce or in a manner "affecting" interstate commerce. The Court declared that it would not, absent a "clear manifestation of intent" by Congress, define:

> "...as a federal crime that conduct which is readily denounced as criminal by the States."

customs agent and the Assistant United States Attorney

As the court further reasoned:

> "Certainly, considerations of conservation of the time and energy of judicial, prosecutorial and administrative personnel would dictate that the state should have undertaken the prosecution of Bell on the firearm charge as well... Certainly, there is no reason to further burden the district courts with additional criminal litigation."

This Court's ruling in Bell was based upon the decision of the Supreme Court in United States v. Bass, 404 U.S. 336 (1971). In Bass, the Court held that the crime of receipt or possession of a firearm by a convicted felon required a nexus with interstate commerce. Again in Bass, the Court based its holding in substantial part upon concern for the "federal-state balance"and reluctance

> "... to define as a federal crime conduct readily denounced as criminal by the States." 404 U.S. at 349

The Court therefore refused to adopt the broad construction urged by the Government since it would render:

> "... traditional local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources."

Similarly, in Rewis v. United States, 401 U.S. 808 (1971), the Court held that conducting a gambling operation frequented by out-of-state bettors did not violate the Travel Act, ruling that an expansive interpretation of the federal criminal statute:

> "... would alter sensitive federal-state relationships, could overextend limited federal policy resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies." 401 U.S. at 812

Finally, as the Supreme Court in Younger v. Harris, 401 U.S. 23 (1971) (a case cited by both Bass and Bell as a principal basis of the federalism proposition) so carefully enunciated, sensitivity to principles of what the Court referred to as "Our Federalism," requires that the federal government,

> "... anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future." 401 U.S. at 44-45.

The same basic principles of federalism discussed in the Bell, Bass, Rewis and Younger decisions apply to the case at bar. There is a point beyond which federal jurisdiction should not extend, not simply to protect the accused from unwarranted intrusions but to provide a proper balance between federal and state domains.

In this case, that point should be the point at which the owner-consignee obtained release of the goods at the pier, loaded them into his truck, and drove away toward a local destination of his choice. If not at that point, then certainly at the point when he parked his truck at his warehouse and partially unloaded it.

To hold otherwise would extend federal jurisdiction into strictly local events, thereby encroaching upon the state's jurisdiction, should it desire to exercise it, and increasing the already heavy burden of federal law enforcement. By such reasoning, any air traveler, (or for that matter, a traveler by bus or train) picking up his bags from an interstate or foreign flight or any person picking up a package from a freight terminal could claim the protection of federal criminal laws against a later theft of his baggage or packages from the stoop of his home. In the interest of the federal-state balance, federal jurisdiction should not extend so far. Accordingly, the motion for judgment of acquittal should have been granted.

II. THE COURT ERRONEOUSLY WITHDREW FROM THE JURY AND DIRECTED A PARTIAL VERDICT UPON THE ISSUE OF WHETHER THE GOODS WERE MOVING AS A FOREIGN SHIPMENT AT THE TIME OF THE THEFT.

After the court declined to enter a judgment of acquittal on the foreign commerce issue as a matter of law, it also ruled against defendant in his efforts to fully develop the factual aspects of the foreign commerce issue. In denying the acquittal motion, the court had conceded that:

> "... this is not a black and white case. It is a close case..." (App.157a)

The basis of defendant's position on the factual aspect of the issue was that the jury, in deciding whether the goods had been delivered out of foreign commerce prior to the alleged

theft, should have been permitted to evaluate all of the facts and circumstances, including the facts that the goods were picked up by the consignee's employee in the consignee's truck, signed out by customs, transported to the consignee's store and partially unloaded prior to being taken. The court's position was that determination of these factors was strictly a matter of law and that only if the goods had become subject to the consignee's complete dominion and control by being unloaded into its premises, could the jury find as a fact that they were no longer in foreign commerce (App.164a-187a).

The fact that this issue was the focal point of the case is highlighted by the fact that in spite of the very limiting instructions which the court later gave on the issue of foreign commerce, the jury returned with a question directed to this issue and had to be further instructed (App.256a).*

The governing premise is that the Government must prove every essential element of a criminal prosecution beyond a reasonable doubt, Christoffel v. United States 338 U.S. 84 (1949). In a criminal case, the judge is not empowered to direct a verdict of guilty, United Brotherhood of Carpenters and Joiners of America v. United States, 330 U.S. 395 (1946), nor may it direct the jury to find a controverted fact against

* This is further highlighted by the fact that the jury in the second trial of defendant's co-defendant (the first trial having resulted in a hung jury) returned no fewer than three times for further instructions on the issue of foreign commerce (Trial Transcript of Itshak Bikel, No. 75 CR 782, January 21, 1976.) The first question asked by the Bikel jury was simply: " What constitutes dominion?" A later question was: "Does the fact that the driver was an employee of the Fried Trading Company and had signed for receipt of the goods constitute possession of Fried?"

a defendant Konda v. United States, 166 F. 91 (7th Cir. 1908).

Thus it has been held that the issue of whether an automobile was moving in interstate commerce at the time of a sale in violation of 18 U.S.C. §2314 is:

> "...a question of fact under the surrounding circumstances in each particular case. Being a question of fact it is for the jury to determine." Schwachter v. United States, 237 F.2d 640 (6th Cir. 1956) at 644.

The Court in Schwachter deemed the preservation of the jury's function in the factual determination of the commerce issue to be particularly critical, since:

> "...its character of being a part of interstate commerce does not continue indefinitely after its transportation ends. After a period of time and depending upon what is done with the car, it may no longer be correct to treat it as moving in interstate commerce." (Id. at 644)

See also United States v. Manuszak, 234 F.2d. 421 (3d Cir.1956); Parsons v. United States, 188 F.2d.878 (5th Cir.1951); Grimsley v. United States, 50 F.2d.509 (5th Cir. 1931); Wolf v. United States, 36 F.2d.450 (7th Cir.1929); Davidson v. United States, 61 F.2d.250 (8th Cir.1932).

Similar results have been reached in cases involving other facts which were improperly withdrawn from the jury. United States v. England, 347 F.2d.425 (7th Cir.1965)(income tax evasion case - instruction that annual IRS assessments were valid); Carothers v. United States, 161 F.2d.718 (5th Cir. 1947)(violation of price control Act - price); Brooks v. United

States, 240 F. 2d. 905 (5th Cir.1957) (perjury-authority of one who administered underlying oath); Konda v. United States, 166 F.91 (7th Cir. 1908) (mailing obscene pamphlet-obscenity). And in United States v. Gollin, 166 F.2d.123 (3d Cir.1948), cert. denied, 333 U.S. 875 (1948), the court expressly recognized that the commerce issue in a prosecution under the predecessor statute to 18 U.S.C. §659 is an issue for the jury, although, in light of the above authority, it is submitted that the court there unduly circumscribed the issue by holding that the jury should have been permitted to determine intermediate credibility issues only and not the ultimate commerce issue under all of the circumstances. See also, United States v. Tangley, 466 F.2d. 27 (6th Cir. 1972); United States v. Allegrucci, 299 F.2d. 811 (3d Cir.1962); Goldstein v. United States, 73 F.2d. 804 (9th Cir.1934).

Because the commerce issue was one of fact, and because in light of the authorities set forth in Section I above, the determination of whether goods have been delivered out of commerce into the dominion and control of a consignee involves an evaluation of numerous facts and circumstances, the issue in this case should have been preserved for the jury in a form in which all such facts and circumstances could have been properly evaluated.

The court's rulings against defendant on this issue took several forms. They:

1) denied counsel the right to argue the factual

issue of delivery, dominion and control as an end point to foreign commerce;

2) refused to permit defendant's requested instruction on the factual issue of delivery, and

3) took the factual aspect of the commerce issue from the jury by instructing the jury that it could find that foreign commerce ended only if the goods had been unloaded into the Fried premises.

A. Limitations upon Counsel's latitude in closing argument.

After the motion for judgment of acquittal on the foreign commerce issue was denied, and in connection with a colloquy concerning defendant's proposed requests to charge on the issue, defense counsel sought rulings from the court on the latitude he would be allowed in arguing this issue to the jury.

> Mr. Youtt: ...I would propose to argue to the jury in substance the argument which I made to you and which you rejected, concerning the question of whether actual pickup at the pier constituted delivery as a matter of fact.
>
> The Court: You can't. You are now arguing law.
>
> Mr. Youtt: I would contend, your Honor, that is an issue of fact. (App. 165a-166a)

The court went on to explain that his determination that the shipment was still in foreign commerce after the truck was parked near the Fried Trading Company was a determination of law. The only issue of fact would be whether the jury credited the testimony of witnesses that the truck was so parked:

The Court: ...They don't have to believe O'Neill and they don't have to believe anybody else, if they don't want to. But if they reach that conclusion, it is my decision that, as a matter of law, this shipment was still in foreign commerce. I am going to so charge. There would be no point in me denying your motion here this morning and then letting you argue that legal point before the jury. It is a matter of law and not a matter of fact. What is a matter of fact is whether they believe O'Neill and the other witnesses (App. 166a-167a).

Numerous other requests for latitude in argument were made by counsel, all of which were denied. Examples of such requests include the following:

Mr. Youtt: I say the issue of delivery is a question which embraces the entire question of custody, control, dominion, whether they'd been released from customs, whether or not they -- part of the goods had been removed.

The Court: No. I don't think we can do that. I am going to let -- released from customs. I don't believe, as a matter of law, they can find that delivery was made. (App. 171a).

* * *

Mr. Youtt: There is the issue. If we are going to argue complete possession, shouldn't I be able to say that complete possession started when we directed the loading of the truck at the dock.

The Court: No. (App. 174a).

* * *

Mr. Youtt: If you have ruled, as a matter of law... that I am not entitled to a directed verdict --to a verdict of acquittal on that particular issue from the bench. However, what I would say is that leaves this question of delivery, which you've acknowledged is a close question, to be not merely a pure question of law, but rather a question of fact. If you say then in ruling --

The Court: No. (App. 176a).

* * *

Mr. Youtt: I say that dominion and control and total possession, evidence of that, starts at the point when the driver directs the loading of that particular shipment at the pier.

The Court: No.

Mr. Youtt: And continues when the driver stops for a cup of coffee and continues on --

The Court: No. I will say, as a matter of law, that is not so. If they so found it, I would set it aside, if I could. I don't think I could because double jeopardy would prevent it and I will not have that. The answer to that is no. Because it is not so.

Mr. Youtt: I have no other way to argue.

The Court: Then you won't be able to do anything else about it except appeal to the Court of Appeals and have me reversed. (App. 184a).

Indeed, prior to the charge, even the Assistant United States Attorney anticipated a problem in the charge's vagueness on the matter of describing dominion and control:

"I think the jury is going to wonder what dominion and control means. That's why I think the instruction has to be more specific as to the facts.

* * *

Just saying dominion and control, they're going to be left wondering what does that mean." (App.182a)

Undaunted by former adverse rulings, defense counsel quickly renewed his request for an opportunity to argue the matter in summation by stating: "I'm prepared to tell them what it means, your Honor." The Court, however, replied:

"We are not going to do that. It's like possession. We are not going to do that. You are not going to transfer this case, this question of law to the jury, Mr. Youtt, under no circumstances. I will not permit it. It is a question of law." (App. 183a).

The Sixth Amendment unequivocally guarantees to all criminal accused the right to the assistance of counsel. As

the Supreme Court has recently observed:

> "The decisions of this Court have not given to these constitutional provisions a narrowly literalistic construction. More specifically, the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact-finding process that has been constitutionalized in the Sixth and Fourteenth Amendments." Herring v. New York, _____ U.S. __95 S. Ct.2550 (1975).

It goes without saying that the court's error in withdrawing the foreign commerce fact issue from the jury's consideration was compounded by the court's prohibition of closing argument bearing upon that issue. See United States v. Dibrizzi, 393 F. 2d. 642 (2d Cir. 1968) (within broad limits counsel for both sides are entitled to argue inferences which they wish jury to draw from evidence); United States v. Gerry, 515 F. 2d. 130 (2d Cir. 1975) (id.)

B. Denial of the defendant's request to charge.

Defendant's second request to charge, which the court declined to include within its charge (App.251a-252a) would have provided a factual framework upon which the jury could evaluate the question whether the goods had been delivered out of foreign commerce:

> "The facts that the shipment had been released by Customs, that it had been picked up by the ultimate consignee, that it had arrived at the location of delivery, and that it had been partially unloaded are all factors which tend to support a finding

> that the shipment had been 'delivered' at the time they were taken. If indeed it was delivered at that time, it no longer constituted a foreign shipment. If you find any such facts to exist and if the existence of such facts creates a reasonable doubt that the shipment constituted a foreign shipment at the time of the theft as charged in the indictment, then you must find the defendant not guilty."

Because the factors included within the proposed charge were all factors which other courts had determined to have a significant bearing upon the issue of foreign commerce, the court below erred when it refused to give the charge.

C. The court's charge on the foreign commerce issue.

The court's first charge on the subject of foreign commerce clearly set forth the court's opinion as a matter of law that foreign commerce cannot end until actual unloading into the warehouse of ultimate destination:

> "And this foreign shipment continues until the merchandise arrives at its destination, that is, Fried's place of business, and is there delivered to the consignee by actual unloading or by presenting to the consignee complete possession over which he has complete dominion at the time.
>
> Until that occurs, the shipment is still a foreign shipment. It is not enough just to stop in front of the Fried place of business." (App. 233a-234a).

As a somewhat inconsistent and confusing alternative to that portion of the foreign commerce charge that goods come to rest only upon unloading, the court added that if the jury were to find:

disposition); United States v. Carter, 482 F.2d 728, 157

> "...that in actuality the Fried Trading Company had complete possession, dominion and control over the truck and the cartons, then you may find that the shipment was no longer in foreign commerce at the time of the theft." (App. 234a).

Such an addition was improper and failed to correct the earlier portion of the charge for several reasons. First, it set forth a confusing proposition which was entirely inconsistent with the court's earlier statement that:

> "It is not enough just to stop in front of the Fried place of business." (App. 234a).

Moreover, the dominion and possession portion of the charge is improper in that it fails to define or explain those terms so that a jury might find that dominion and control over the truck existed prior to unloading.

After the jury returned with a question addressed to the issue of federal jurisdiction (App. 256a) the court proceeded to expand upon its instruction concerning the issue of foreign commerce. The court's final statement on the matter declared that:

> "...the concept of foreign commerce in the context of a statute is a little different than what we understand that term to mean.
>
> It does mean that the shipment does not lose its characteristic as a foreign shipment until the person has complete control of it. If it is unloaded, then it is no longer a foreign shipment.
>
> But the fact that it arrived at its destination at that moment does not mean it lost its characteristic as a foreign shipment.

> The fact that the truck stopped does not mean it lost its characteristic.
>
> It is not necessary for the wheels to go around to constitute part of a foreign shipment. I cannot help you, I don't think, any more (App. 259a-260a).**

Such a charge by the court constituted in effect a direction of a verdict on the foreign commerce issue in the context of this case. The charge was devoid of any instructions which would have assisted the jury in weighing the factual aspects of dominion, custody, and control and factors

---

** It should be noted that the court's handling of the charge in the later trial of the co-defendant, Itshak Bikel, on January 21, 1976, reflects a subtle change in the court's position. There, in response to the jury's question as to what constitutes dominion, the court instructed that dominion merely means

> "...that the consignee had now complete possession of his shipment in the sense that he was able at that moment to physically dispose of it or transfer as well.
>
> * * *
>
> You determine when this truck was double-parked out there for that five minutes, whether he had control and possession and dominion of it, so that he could dispose of it and transfer it immediately himself. It doesn't mean legal ownership. It means possession and power at that time, at that moment. The timing is important." (Charge to Jury in United States v. Itshak Bikel, 75 CR 782 [January 21, 1976])

It is significant to note that not long after this explanation was given the jury returned its verdict of not guilty for the co-defendant.

bearing upon delivery to the consignee. Moreover, it permitted the jury to decide that the foreign commerce character of the shipment had ended only if the goods had actually been delivered into the Fried premises, a proposition for which no evidence whatsoever had been tendered.

The court's charge, therefore, constituted a partial direction of a verdict, upon the issue of whether the goods were moving as a part of foreign commerce at the time of the theft. Accordingly, even if defendant may not have been entitled to a verdict of acquittal on the commerce issue, he at least is entitled to a reversal of his conviction and a new trial, at which the factual aspects of the foreign commerce issue may properly be presented to a jury.

III. THE COURT ERRONEOUSLY REFUSED TO ORDER DEFENDANT'S ORAL AND WRITTEN STATEMENTS SUPPRESSED.

Within a period of two days after his arrest, defendant made two written statements and an oral statement which were introduced in evidence against him. The written statements appeared in the context of two "Waivers of Speedy Arraignment" which the Assistant United States Attorney and Customs agents prepared and requested defendant to sign in order that he might continue to assist them in their search for the goods. (Government exhibits 10,11,App.265a,266a). The oral statement took place in an interview of Mr. Brach by

the Customs agent and the Assistant United States Attorney on the case, shortly after the defendant's arrest. In the course of the oral statement, the defendant freely admitted having taken the goods. However, he later testified that he did so because he was under the impression he was being offered immunity from prosecution. As he stated in response to the question:

> Q What reason again was it that you made that statement?
>
> A Because they would protect me, put me up in a hotel and so on, wouldn't prosecute me." (Transcript of suppression hearing, p. 82)

The Government witnesses testified that no such promises of immunity had been made (transcript of suppression hearing, p. 102). However, it is a fact that defendant was in custody prior to his arraignment for a period of some two days, that the subject of the Government's support for a plea of leniency was discussed (transcript of suppression hearing, p. 102) that the subject of the defendant's cooperation in other criminal cases was also discussed (ibid) that at no time was the defendant represented by counsel, and defendant is a Hasidic Jew who received training in English as a second language only through the eighth grade (transcript of suppression hearing, p. 72-73).

The court denied defendant's motion to suppress the statement, finding as a matter of "credibility," that there had been "no problems of immunity in order to obtain Mr. Brach's cooperation." (Transcript of suppression hearing, pp. 103-04).

Defendant contends that on the record set forth above, the court should have suppressed the statements of defendant as having been involuntarily given.

As the Supreme Court has long ago held, Bram v. United States, 168 U.S. 532 (1897) and recently reaffirmed [Brady v. United States, 397 U.S. 742 (1970); Malloy v. Hogan, 378 U.S. 1 (1964); Haines v. State of Washington, 373 U.S. 503 (1963)] a confession must be:

> ".'. free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.' " Bram v. United States, 168 U.S. at 542-43.

As the Court has observed with respect to a defendant in custody, even mild promises of leniency are sufficient to bar a confession:

> "...not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess." Brady v. United States, supra, 397 U.S. at 754 (dicta).

In evaluating the impact of promises upon the voluntariness of a confession, it need not be found that a specific promise was in fact made, if it can be said that the accused:

> "... reasonably believed that a promise of leniency had been made to him even though no such promise in fact had been made, and this belief induced his statement..." Hunter v. Swenson, 372 F. Supp. 287 (W. D. Missouri 1974) at 299.

See also United States v. Harris, 301 F. Supp. 996 (E.D.Wis. 1969); United States ex rel. Caserino v. Denno, 259 F. Supp. 784, 790, (S.D.N.Y. 1966).

See also Grades v. Boles, 398 F. 2d. 409 (4th Cir. 1968) in which the court condemned the circumstances surrounding the making of a confession during a "de facto plea bargaining" session which took place during a 16 hour period of custody.

The court observed that:

> "This in no way approximates the fair opportunity to mature deliberate judgment which is a prerequisite to valid plea bargaining." 398 F. 2d. at 409.

and ruled that:

> "...the perspective from which the statements must be viewed is that of the defendant, not the prosecutors." 398 F. 2d. at 412.

In light of the above authorities, defendant contends that the court should have determined the motion not on the issue of credibility whether promises were made, but on the issue as to what defendant, under all of the circumstances perceived to be as a promise or inducement.

IV. THE COURT ERRONEOUSLY FAILED TO INSTRUCT THE JURY THAT IT COULD DISREGARD DEFENDANT'S STATEMENTS IF IT FOUND THEM TO BE INVOLUNTARY

The arresting Customs agent testified at length concerning the oral and written statements made to him by the

> and also he testified that while Simon Brach wanted to know whether a deal could be made, that the answer was no, but that he would not agree to give him any immunity but he would agree that at the day of sentencing, if he was found guilty, he, O'Neill, and the United States attorney would bring to the attention of the Judge the cooperation of Simon Brach.
>
> I think you will remember that testimony, as well as I, and I will not detail the testimony of the witnesses because I know you will recall them."(App.238a-239a).

The court specifically referred to the defendant's claim of a promise:

> "He also stated that he signed a confession to the effect that he stole the truck because he was promised immunity if he would tell where the Government could recover the stereos."(App. 239a).

However, the court failed to instruct the jury that in the event it found that the statements were involuntarily made, the jury could disregard them in reaching its verdict. Such failure to so instruct constituted prejudicial error inherent on the face of the charge. Jackson v. Denno, 378 U.S. 368 (1964). See also United States v. Strickland, 493 F.2d. 182 (5th Cir.), cert. dismissed, 419 U.S. 801 (1974) (after resolving the issue of voluntariness adversely to the defendant in a suppression hearing, it is proper procedure for the trial court to submit the issue to the jury). Cf. Government of Virgin Islands v. Gereau, 502 F.2d. 914 (3d Cir.1974), cert. denied, _____ U.S.___, 95 S.Ct. 829 (1975).

defendant (App.100a-125a). He also provided testimony concerning the matter of promises and inducements (App.96a-100a).

The defendant also testified concerning the cirumstances surrounding the making of the statements as follows:

> A It was like this. When I was arrested -- no. The customs agent, I told him, "How can you arrest me?" He says, "Your brother filed a complaint. We got a warrant for you." The customs agent tells me, "Listen, we want to know where the goods are." I told them that's where the goods are and now the beginning, I don't want to tell them nothing. Then he started, you know, confusing me with, you know, "We want to know where the goods are, we ain't going to bother you, we ain't going to arrest you." So the day I was arrested I was brought over to World Trade Center and I was -- I still told them it's mine. My brothers -- you know, claimed it's -- it was stolen. And all that. At that point, you know, started getting me so confused that -- telling me, "You're going to go away to jail and you know you have a prior record, you're no good," so I told him it's still mine. He told me "If you know where the goods are, you know, maybe we could straighten it out. You know, we ain't going to arrest you, we ain't going to prosecute you." I told him I sold it to -- and in order to -- I couldn't remember exactly where the stuff was, so he told me, "Sign this paper. That way you show us where the goods are." So I sign the form and then we finally find it. The following day we went again. He told me, "Sign the paper that you stole it and all this," and I signed the form and that was it. (App.198a-199a).

In his charge to the jury, the court commented upon the evidence surrounding the making of the defendant's statement:

> "You also heard the testimony of Gerald O'Neill concerning the signed statements by Simon Brach to the effect that he stole the truck.
>
> You will remember also that Gerald O'Neill stated that he gave Simon Brach his warnings, to wit, that he did not have to make a statement, did not have to say anything before he signed the document,

V. TESTIMONY THAT CUSTOMS AGENTS SEARCHED FOR DEFENDANT AT RACETRACKS AND IN BETTING PARLORS WAS IRRELEVANT AND PREJUDICIAL AND SHOULD HAVE BEEN EXCLUDED

The customs agent who arrested defendant, Agent Gerold O'Neill, testified over objection, that prior to defendant's arrest, he searched for defendant for a period of several weeks, and that his search included such locations as "the Big A", Aqueduct Race Track, [and] "the OTB parlors" (App.89a). The objection was made "... on the basis of relevance and danger of prejudice" (App.89a).

Indeed, the court later ruled that evidence of defendant's absence for a period of weeks prior to arrest was not relevant, when it refused to submit a "flight" charge to the jury (App. 253a).

It is therefore clear that agent O'Neill's testimony concerning his unsuccessful search for defendant was manifestly irrelevant to the issues in the trial and should have been excluded in accordance with Rule 402 of the Federal Rules of Evidence. References in that testimony to race tracks and betting parlors, inferring that Mr. Brach was a gambler, certainly had the effect of presenting a matter of undue prejudice before the jury.

Even if it had been relevant, such testimony should have been excluded under Rule 403 which provides that:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...."

There is, of course, wide discretion in the trial judge to exclude evidence that may confuse the jury, United States v. Ravich, 421 F.2d.1196 (2d.Cir.)cert. denied, 400 U.S. 834 (1970); Cruz v. U.S. Lines Co., 386 F. 2d.803 (2d. Cir. 1967) especially if that evidence is of slight, or no probity. United States v. Bowe, 360 F.2d. 1 (2d. Cir.)cert. denied, 385 U.S. 961 (1966). Here, the evidence tended to indicate that defendant's character may have been unsavory, an issue which the defendant had not placed in dispute and which the Government would not have been permitted to raise directly. United States v. Tomaiolo, 249 F. 2d. 683 (2d.Cir. 1957); United States v. Masino, 275 F.2d.129 (2d.Cir.1960); United States v. James, 208 F.2d.124 (2d.Cir.1953); United States v. Plante, 472 F.2d.829 (1st Cir.) cert. denied, 411 U.S. 950 (1973).

VI. TESTIMONY BY THE ARRESTING CUSTOMS AGENT THAT ARREST WARRANTS WERE ISSUED AGAINST THE PERSONS TO WHOM DEFENDANT HAD SOLD THE ALLEGEDLY STOLEN GOODS WAS IRRELEVANT AND PREJUDICIAL AND SHOULD HAVE BEEN EXCLUDED

The arresting Customs agent testified that after he learned the identities of the individuals to whom defendant sold the goods in question, the Assistant United States Attorney "... obtained an arrest warrant ..." (App. 108a) for the arrest of the purchasers. An objection was made upon the grounds of relevance and prejudice, and it was requested that the testimony be stricken. (App. 108a). The court stated that it did not believe the evidence to be "particularly relevant", but permitted its introduction "subject to connection" (App. 109a).

The basis of defendant's objection with respect to this evidence is that it implies wrongdoing on the part of the recipients of the goods, which could be inferentially used to corroberate the fact that defendant had, in fact, stolen the goods rather than lawfully taken them from his family business.

At the close of the Government's evidence, counsel

renewed the request that the testimony concerning arrest warrants of the purchasers be stricken. However, the court again denied counsel's application (App. 162a-164a).

Again defendant contends that testimony concerning the arrest warrants of the purchasers of the goods is irrelevant to the issue whether defendant stole the goods in the first place. It therefore should be excluded under Rule 402 of the Federal Rules of Evidence which prohibits the introduction of evidence which is not relevant. Further, even if such evidence had been relevant, it should also have been excluded under Rule 403, since whatever probative value it may have had is substantially outweighed by the danger of an unfair prejudicial inference that defendant must have been guilty because he sold goods to suspicious people. See cases cited, supra, Section V.

VII. THE COURT ERRONEOUSLY REFUSED TO EXCLUDE CROSS-EXAMINATION TESTIMONY CONCERNING DEFENDANT'S PRIOR CONVICTIONS

The defendant testified at his trial. On cross-examination, he was asked if he had been previously convicted for

> "possession and sale of a foreign shipment of freight that was stolen from a foreign shipment of freight". (App. 199a).

He was also asked whether he had been previously convicted for

> "... bringing a stolen motor vehicle into the State of New Jersey." (App. 201a).

After both questions, defense counsel objected, and his objections were overruled (App.200a, 201a).

Rule 609 of the Federal Rules of Evidence permits cross-examination interrogation concerning prior felony convictions, subject to the requirement that a court determine

> "... that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."

Defendant contends that in his case, the prejudicial effect of evidence of his prior convictions indeed outweighs its probative value and should have been excluded.

In fact, the issues of prejudicial impact versus probative value concerning these convictions had been previously aired before the court on a motion to exclude

evidence of those convictions as similar acts (App.10a-14a) at which time the court excluded the evidence as similar acts, in part because of the possible danger that they might, in the words of the court,

> "just induce the jury to convict the man because he has committed crimes in the past or that he is -- or that he seemed to be a person who has a criminal background."

and that there was a danger that such evidence might:

> "confuse the issue and make it very difficult for Mr. Brach to get a fair trial."

For the same reasons, and especially in light of the fact that one of the prior convictions was for a crime charged under the same statute for which defendant was on trial, defendant contends that the prejudicial effect of his testimony concerning prior convictions was not outweighed by the probative value of such evidence, and should have been excluded under Rule 609(a)(1). United States v. Kaplan, 416 F.2d 103 (2d Cir. 1969) (evidence of similar acts, including crimes, inadmissible in discretion of trial court if relevant for purpose other than showing defendant's criminal character or

disposition); United States v. Carter, 482 F.2d.738, 157 U.S. App. D. C. 149 (1973) (Admission of testimony concerning six prior similar convictions was reversible error); United States v. Kahaner, 317 F.2d. 459 (2d. Cir.), cert. denied, 375 U. S. 836, rehearing denied, 375 U.S. 926 (1963), (trial judge should exclude evidence of other crimes "where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it."); United States v. Baum, 482 F.2d. 1325 (2d. Cir. 1973); United States v. Puco, 453 F.2d.539 (2d. Cir. 1971); United States v. Palumbo, 401 F. 2d. 270 (2d.Cir. 1968), cert. denied, 394 U.S. 947 (1969).

VIII. DEFENDANT HAS BEEN DENIED HIS SIXTH AMENDMENT RIGHT TO SUMMON WITNESSES IN HIS BEHALF BY THE REFUSAL OF THE COURT BELOW TO PERMIT HIS WIFE TO TESTIFY.

Defendant attempted to summon his wife as his first witness, to testify that defendant, with the acquiescence and consent of Fried Trading Company, continued to possess keys to the allegedly stolen truck, until as late as two weeks before the trial (App.191a). Such testimony would bear on the contention that defendant as

a member of the family business did not steal the struck but was entitled to drive it. However, the court refused to permit Mrs. Brach to take the stand, ruling that such testimony would be irrelevant. (App. 191a-192a).

Since Mrs. Brach had relevant evidence to present and was ready to testify, and since the nature of her testimony would not require lengthy presentation and would not otherwise burden the orderly proceeding then taking place, the court below improperly deprived defendant of his right to present her as a witness in his defense. United States v. Seeger, 180 F.Supp. 467 (S.D.N.Y. 1960); Braswell v. Florida, 463 F.2d 1148 (5th Cir. 1972). See also United States v. Nixon, 94 S.Ct. 3090 (1974); U.S. ex. rel Nelson v. Follette, 430 F.2d 1055 (2d Cir. 1970) cert. denied 401 U.S. 917 (1970).

Moreover, the evidence proffered would surely have met the test of relevancy. Federal Rules of Evidence 401; United States v. Pugliese, 153 F.2d 497 (2d Cir. 1945) (each bit of evidence must have enough rational connection with issue to be considered factor contributing to answer); United States v. Lagow, 66 F.Supp. 738 (S.D.N.Y. 1946),

aff'd, 159 F.2d 245 (2d Cir.) cert. denied, 331 U.S. 858, rehearing denied 332 U.S. 785 (1947). And the exclusion of evidence logically relevant in a criminal prosecution must be justified by an overriding public policy expressed in the Constitution or laws. United States v. Benanti, 244 F.2d 389 (2d Cir.) rev'd on other grounds, 355 U.S. 96 (1957); United States v. Schipani, 289 F.Supp. 43 (E.D.N.Y. 1968).

IX. THE GOVERNMENT FAILED TO ESTABLISH A PRIMA FACIE CASE ON THE ISSUE OF WHETHER THE GOODS WERE IN FACT STOLEN

No witness testified that defendant would not have a right to take the goods in question. As a matter of fact, it was established by numerous witnesses that defendant, as a member of the Fried family, was entitled to a share in the business of the Fried Trading Company. It was also established that defendant had previously shared in the income from the business and that he had recently been engaged in a family dispute concerning the matter of his entitlement to additional monies from the Fried Trading Company.

Neither of his brothers who testified for the defense, the only principals of the Fried Trading Company

to testify, stated that he was not entitled to take the goods in question. As his brother Sigmond testified in res onse to the question whether he had a right to take the truck:

> "I am not the one to say really that he had a right or not to take it."

However, he later testified that defendant was and remained a partner in the business. (App. 211a-212a).

In his charge to the jury, the court characterized the evidence concerning the matter of theft as follows:

> "He admitted he was not working for the Fried Company at the time he took a truck and the argument has been made that this is a big family affair, and I think, as a matter of law, I must tell you that, of course, one can steal from a family, his own family, as well as he can steal from anyone else. But that is up to you to decide, not me.
>
> I am not making any finding of facts. I am just telling you, as a matter of law, it is possible to steal from a family as well as it is from third parties." (App.240a).

It is a part of the Government's burden to establish facts to support each and every element of the charges in an indictment. The failure to do so must result in the granting of a verdict of acquittal

for the date as a matter of law. It cannot be disputed that the stealing of the goods is an element of the crime here charged. Recognizing that goods cannot be proved stolen without proof of ownership and of an unlawful taking, the courts have held that an indictment under this section (or its predecessor) must allege ownership or other means tantamount to identification by ownership. United States v. Finderman, 20 F.R.D. 459 (D. Mont. 1957); United States v. McCulloch, 6 F.R.D. 559 (D. Ind. 1947). It is then part of the Government's burden to prove that the goods so identified have in fact been stolen from interstate or foreign commerce. United States v. Freedman, 268 F. 655 (D. Pa.), aff'd 274 F.603 (3d. Cir. 1920). The stealing or unlawful taking must be done with the requisite specific intent to deprive the owner of the use of the property. Morissetti v. United States, 342 U.S. 246 (1952) See also, United States v. Kemble, 196 F.2d 315 (3rd. Cir. 1952), where the court held that failure to charge the jury as to the requirement of a specific intent to steal was error; the court further pointed out that no such specific intent exists if

defendant believed that he was entitled to the property at the time of the taking.

On these authorities, defendant submits that the Government clearly failed to establish a prima facie case on this issue.

X. THE DISTRICT COURT ERRED IN REFUSING THE DEFENSE REQUEST TO ADJOURN THE TRIAL UNTIL THE SAME COURT HAD DECIDED DEFENDANT'S APPLICATION UNDER 28 USC § 2255.

After a joint trial in 1972, the defendant and his mother were each convicted of possession and sale of stolen goods under 18 USC § 659, United States v. Fried and Brach, 71 CR 584 (EDNY, before the Hon. John R. Bartels). The convictions of both were affirmed by this court in United States v. Fried and Brach, 464 F. 2d. 983, cert. den. 409 U.S. 1059 (1972). Thereafter, defendant's mother filed a motion for a new trial based on newly discovered evidence, which included prosecutorial suppression of the pending indictment against the key Government witness at their trial. Said motion was denied by Judge Bartels, 359 F. Supp. 227 (1973). This Court, however, reversed in United States v. Fried, 486 F. 2d. 201, cert. den. 416 U.S. 983 (1973) and vacated the conviction of Mrs. Fried on the "sale" count.

On July 3, 1975 defendant filed an application before Judge Bartels requesting the vacating of his sentence pursuant to 28, USC § 2255 by reason of the reversal of his mother's conviction and other grounds (75 Civ. 1069 EDNY). On September 19, 1975 Judge Bartels issued an order to show cause to the Government and responsive papers were filed on October 20, 1975. It was defendant's contention that since the sole evidence against him came from the now tainted key Government witness, he was entitled to the same relief as this Court granted to his mother. Defendant's position was further bolstered by the fact that other witnesses who had testified against his mother on the possession count, had been totally silent as to defendant. Therefore, defendant's conviction for both possession and sale were a product of of prosecutorial misconduct. Judge Bartels has not yet ruled on defendant's application, although almost eight (8) months have transpired since the application was made.

Prior to the trial of defendant in the case at bar, defense counsel wrote to the court requesting an adjournment of the trial date until the § 2255 application had been decided (App. 5a-6a). It was counsel's position that since the defendant had a strong basis for requesting § 2255 relief,

he should not be subjected to the risks of having his prior convictions used against him (as they ultimately were).

This is a somewhat unique situation in which the District Court is in complete control of defendant's fate and the fairness of defendant's trial. Since the District Court is constrained to fairness, simplicity and the elimination of unjustifiable expense and delay in the administration of justice, F.R.Crim. P. 2, it is incumbent on that court to determine cases in such a way as not to put a defendant at a disadvantage in a trial. Although it is true that a prior conviction can be introduced, even if the conviction is being appealed, Fed. Rules of Evidence 609 (e), the situation is different where the District Court has deferred its own ruling. An appeal is beyond the scope of the District Court. It cannot determine the time in which an appeal will be decided. A District Court can, however, control its own calendar.

Obviously, the defendant's application was not frivolous since Judge Bartels issued an order to show cause. Nor was the § 2255 application untimely since it was filed almost four (4) months before trial. In fact, under the Supreme Court's decision in Davis v. United States, 417 U.S. 333(1974)

the defendant's claim for relief was well founded since it relied on an intervening change in law.

Although continuances are discretionary with the trial court, the judge is constrained not to deprive a defendant of that fundamental fairness guaranteed him by the Fourteenth Amendment. Chandler v. Fretag 348 U.S. 3(1954).

Moreover, where fairness dictates that a continuance be granted, it is the responsibility of the trial judge to consider the reasons for the request at the time it is denied. As Justice White stated in Ungar v. Sarafite, 376 U.S. 575, 589 (1964):

> "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. Id.

Here, at the time the request was denied, the orderly and fair administration of justice should have required adjournment until the prior application had been decided.

If the application had been granted, defendant's prior convictions could never have been introduced and critical points in this appeal would never have arisen.

If the application had been denied, the defendant could have taken an immediate appeal and requested a stay of

the impending trial. Even if such a stay were denied, the appeal of the § 2255 application could have been heard before the appeal of the new conviction. A reversal on the denial of the § 2255 application could have been incorporated as one of the grounds for the instant appeal.

In either case, the orderly administration of justice would have been better served by an early determination of the § 2255 application.

To illustrate the procedural quagmire which can now arise by reason of the switch in order of decisions, this Court should consider what will happen if defendant's conviction is now affirmed and either the District Court or this Court later grants the § 2255 application. The defendant can claim, with justice, that the prosecutorial misconduct which prejudiced him in his first conviction, subsequently influenced his second trial. He, therefore, would have to attack his second conviction anew because of the taint at the original conviction - this is a classic case of having the tail wag the dog.

Therefore, defendant contends it was an abuse of discretion and a violation of F.R. Crim.P.2 for the District Court to deny an adjournment until the earlier and more preliminary § 2255 application had been decided. Defendant was and continues to be prejudiced because evidence of his prior convictions was introduced and defendant even now cannot fully join issue on this question because it remains in limbo.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that defendant's conviction should be reversed and the indictment dismissed for failure to establish the foreign commerce character of the goods as a matter of law, and for failure to prove that the goods were in fact stolen as a matter of law.

Alternatively, defendant respectfully submits that his conviction should be reversed and a new trial ordered so that he may:

1) properly present the foreign commerce issue as a matter of fact before the jury; and,

2) be permitted to summon his wife to testify in his own behalf; and, in order that

3) evidence of defendant's prior convictions;

4) prejudicial testimony of the Custom's officer O'Neill; and,

5) defendant's admissions and statements to customs agents

may be properly excluded.

Finally, in the event that a new trial is ordered, it is respectfully requested that the date of his new trial be ordered adjourned until such time as a decision is rendered on his pending petition for relief under 18 U.S.C. § 2255 attacking his 1972 conviction.

Respectfully submitted

THAL & YOUTT
Office & Post Office Address
919 Third Avenue
New York, New York 10022
(212) 751-3300
Attorneys for Defendant-Appellant

Of Counsel
Harry E. Youtt
Steven H. Thal

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

U.S. COURT OF APPEALS 2nd CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

SIMON BRACH,

Defendant-Appellant.

Index No. **76-1030**

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the **13th** *day of* **Feb.** *19*76 *at* **225 Cadman Plaza, Brooklyn, New York**

deponent served the annexed Appellants Brief *upon* **David Trager, United States Attorney**

the *in this action by delivering* 2 *true copy* ies *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* **attorney** *herein,*

Sworn to before me, this **13th** *day of* **Feb.** *19* **76**

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Victor Ortega

VICTOR ORTEGA